IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1013

LT. COL. VINCENT PUGLISI, ET AL, *Petitioners,*

vs.

THE UNITED STATES, *Defendant.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OCTOBER TERM, 1977

No.

LT. COL. VINCENT PUGLISI, ET AL, *Petitioners,*

vs.

THE UNITED STATES, *Defendant.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Lieutenant Colonel Vincent Puglisi et al, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

OPINIONS AND ORDERS BELOW

On September 30, 1976, the Court issued an order consolidating petitioner's ten cases 275-76 through 281-76 and 386-76 through 388-76, Appendix A.

The opinion of the Court of Claims, Appendix B, granting defendant's motion to dismiss the petitions, denying plaintiff's cross-motion for summary judgment and dismissing the petitions was issued on October 19, 1977, 215 Ct. Cl. ——, 564 F.2d 403, 1977.

JURISDICTION

The judgment of the Court of Claims was entered October 19, 1977. The jurisdiction of this Court is invoked under 28 United States Code 1255(1).

QUESTIONS PRESENTED

1. Is the so-called "Dual Compensation Act," 5 States Code 5532, Appendix E, so discriminatory against retired officers of the Regular uniformed services as to contravene the due process clause of the Fifth Amendment to the Constitution of the United States?

2. Did the Court of Claims commit error in holding that a "rational basis" existed for distinguishing between some retired members of a regular component of the uniformed services and all other retired personnel, whether "regulars" or not, military and civilian, for the purpose of dual compensation treatment?

3. Did the Court of Claims commit error in holding that there is a difference between the offices held by retired regular officers and retired reserve officers?

CONSTITUTIONAL PROVISIONS

Article II, Section 2 of the Constitution vests in the President, by and with the advice and consent of the Senate, the power to appoint officers (Appendix C).

Article V of the Amendments to the Constitution provides, in pertinent part that "No person shall . . . be deprived of life, liberty, or property, without due process of law," (Appendix D).

STATUTORY PROVISIONS

5 U.S. Code 5532, the so-called Dual Compensation Act, provides that a retired commissioned officer of a regular component of a uniformed service who is employed by the United States as a civil servant shall thereby forfeit one half of his military retired pay over $3860.00 (Appendix E).

5 U.S. Code 5534 provides that a reserve officer may receive his military pay in addition to any other pay from the United States to which he is entitled (Appendix F).

10 U.S. Code 1401, 3991, 6325 and 8991 provide generally that retirement pay is computed on the basis of 2½% times years of service times basic pay with a maximum of 75% and, in effect, a minimum of 50%. These tables apply to both regulars and reserves (Appendixes G, H).

10 U.S. Code 3911, 6323 and 8911 provide generally that members of the uniformed services become eligible for retirement pay by completing twenty years of active service (Appendix H).

37 U.S. Code 1009 prescribes the rates of basic pay for members of the uniformed services.[1]

STATEMENT OF THE CASE

This is a joint suit brought by 874 plaintiffs in ten separate actions which have been consolidated for trial in the Court of Claims. The pertinent facts and the law

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[1] While not referred to herein for purposes of brevity, similar provisions apply to officers of the Public Health Services, Coast Guard and ESSA.

are identical as to each of the 874 plaintiffs. All are retired officers of a regular component of one of the seven uniformed services, Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service or ESSA who are or have been employed following military retirement in a civilian position with the United States.

The uniformed services are divided into two components, regulars and reserves; there is also a third category similar to reserves, but without component. The regular components consist of those whose full time service on active duty is contemplated. Reserves are those who serve on active duty primarily only when there is a requirement for military personnel in addition to those of the regular forces; however, since the beginning of World War II there have always been large numbers of reserves on active duty, so that many serve for twenty years and more. The "without component" category consists mainly of those who serve only during war time, such as draftees; few if any of these personnel serve on duty more than a few years.

A member who serves on active duty for as long as twenty years qualifies for retirement pay computed on the basis of 2½% times years of service. A member who serves twenty years receives 2½% times twenty, or 50% retirement pay. The maximum that may be received is 75%, reflecting thirty years service (2½% times 30) (See Appendix H, exemplary statutory provisions). While most reserves are forced by military regulation to retire "voluntarily" upon completion of twenty years active service, many such reserves nevertheless receive the full 75% retirement pay because they are entitled to count in computing their retired pay their inactive as well as active service.

Regulars and reserves serve on active duty under identically the same conditions, regulations, discipline and pay; retire under the same laws with pay computed under the same law. They receive the same benefits and privileges after retirement. They wear the same uniform, are exposed to the same hazards, and their survivors get the same benefits. Both during service and after retirement the only way to distinguish between a regular and a reserve is by a suffix added to their serial number, FR for regulars and FV for reserves (Opinion, Part A, Appendix B).

The similarity in treatment, benefits, privileges and pay vanishes, however, when retired members are employed, after retirement in civilian positions. There are 150,000 such retired military members occupying civilian jobs. 145,000 of them receive the full retirement pay they have earned plus their full civilian pay. These are the reserves, the enlisted members, and those regulars fortunate enough to be employed in a civilian position which has been designated as exempt from the Dual Compensation Act. The remaining 5,000, for the reason that they are unfortunate enough to be regular officers, and no other reason, are required to forfeit a large amount of their earned military retirement pay under the provisions of the "dual compensation act." This law provides that a retired regular officer who occupies a civilian position under the United States, unless it is designated as exempt, must forfeit half of his retired pay in excess of $3860.00. In a typical example, a regular Lieutenant Colonel who retires after serving 26 years will be required to forfeit $6065.00 annually of his retirement pay. A reserve, on the other hand, who retires under the same conditions receives the full amount of his retirement pay and the full

amount of his civilian pay even occupying the same civilian position.

A reserve who retires at twenty years can receive anything from the minimum 50% to the maximum 75% which a regular must serve thirty years to earn. Thus, a reserve Major or Lieutenant Colonel who serves twenty years of active duty can receive up to $15,435 (Major) or $17,829.00 (Lt. Col.) in retired pay. A regular would get no more than 50% of a Major or Lieutenant Colonel's pay, $10,290.00 or $11,886.00. In the same GS-12 job the reservist's retirement pay compares to the regular's retirement pay as follows:

20 years	Reserve Major $10,290-$15,435.00	Regular Major $7,075.00	Regular Lt. Col. $7,873.00
26 years	Reserve Lt. Col. $17,450.00-$17,829.00	Regular Lt. Col. $10,665.00	

It is this disparity in retirement pay that plaintiffs contend is so discriminatory as to contravene the due process clause of the Fifth Amendment.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court below found that the classification drawn by Congress, regular retired officers as distinguished from other retired officers, and from regular officers employed in positions exempted from the Dual Compensation Act, is to be examined under the rational basis standard—whether it is rationally related both to a legitimate government interest and to the objective of the particular legislation. *Ohio Board of Employment Services* v. *Hodory,* —— U.S. ——, 45 U.S.L.W. 4544, 4549 (May 31, 1977); *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 312-14 (1976);

New Orleans v. *Dukes,* 427 U.S. 297, 303 (1976); *Hughes* v. *Alexandria Scrap Corp.,* 426 U.S. 794, 813-14 (1976); *Dandridge* v. *Williams,* 397 U.S. 471, 486-87 (1970). Plaintiffs agree. However, the Court found that the difference in treatment between regular and reserve officers for Dual Compensation purposes could be rationalized on two principal grounds. First, according to military policy, regular officers can "normally" serve longer and receive significantly higher retirement pay than reserve officers. However, as demonstrated above, the amount of retired pay a member can receive varies considerably from case to case. What does *not* vary, however is the amount of retired pay received by both regular and reserve commissioned officers when their length of service and grade are the same. Then, the pay of both and the service of both are computed under the same laws (Appendixes G, H) and the amounts of pay are identical to the penny. In comparing a reserve with twenty years service to a regular with thirty years service the Court used examples of glaringly different circumstances to justify the difference in treatment accorded to regular officers. The Court cited in support of its decision the ruling in *Dandridge* v. *Williams, supra,* 397 U.S. 485. But, the instant case cannot be compared with *Dandridge.* There, a Maryland regulation limiting the total amount of welfare that might be paid to a particular household regardless of the number of persons in the family was held to be reasonable. In that case, all families with the same number of dependents were treated alike, e.g., a family with six children was treated the same as all other families with six children. In the instant case, those members with the same entitlements (e.g., number of dependants as in *Dan-*

dridge) are *not* treated alike. And no relationship can be demonstrated between the amounts of combined military retirement pay and civil service pay that the two classifications receive unless the facts are warped by comparing a member who serves twenty years with one who serves thirty years.

The Court stated:

> "Congress, wanting to limit the total government compensation receivable by any one person reduced the retirement pay of regular officers holding federal civilian jobs, with a view toward bringing their total compensation more in line with that of retired reserve officers in such civilian positions. This was neither wholly unreasonable nor invidious." (Appendix B).

Had Congress desired to place a limit on total Government compensation it could very easily have done so; what they did do, instead, was single out retired regular officers and place a limit on them and no others, regardless of the amount of compensation received. As set out with more particularity above, reserve officers can, in fact, receive much more than regular officers in retired pay; with the reduction of the Dual Compensation Act, the difference amounts to thousands of dollars a year. There is no rational relationship between a government objective of setting a cap on dual compensation and the *status of retired regular officers* that can justify singling them out for discriminatory treatment.

Second, the Court found that there was a difference in the offices held by regular and reserve officers. Plaintiffs submit that there is no difference—Constitutionally, the offices are identical. Both are appointed

by the President under Article II, Section 2 of the Constitution to offices created by Congress. The pay, emoluments, gradings and conditions of service are identical in all respects. Even if one perceives some indefinable theoretical distinction, this difference has nothing whatsoever to do with the pay accorded these officers; consequently, if there is a difference, it is not material to the issues in this case, which has to do exclusively with the matter of total compensation. The retired regular officer and the retired reserve officer are as alike as the Chinese laundrymen in *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). There, this Court found that the only difference between some 80 laundrymen who were granted business licenses by San Francisco and some 200 who were denied such licenses was that the latter were Chinese. The only difference between regular and reserve officers is that the regulars are regulars and this distinction is not relevant to any perceivable governmental objective in enacting the Dual Compensation Act. *Cf Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552 at 556 (1974); *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92.

The decision of the Court of Claims has direct impact against the 874 joint plaintiffs and also affects 5,000 more regular retired officers presently employed in civilian jobs by the United States, plus many hundreds of thousands of present regular officers, active and retired, who are inhibited from civilian employment by the compulsory forfeiture of a substantial part of their earned retirement pay. This is an important question of Constitutionality of a federal law which has not been, but should be settled by this Court.

In addition, plaintiffs submit that the Court of Claims has decided this case in a way in conflict with applicable decisions of this Court in that the Court has applied the rational basis rule to a classification which bears no reasonable relationship to the objective of the law concerned herein, the Dual Compensation Act, contrary to the decision of this Court in *Dandridge, Kotch* and *Yick Wo, supra.*

CONCLUSION

While there may be some theoretical difference between reserve and regular officers, the differences have nothing to do with pay. The Dual Compensation Act discriminates against retired regular officers without rational basis and without relationship to a valid governmental purpose. The decision of the Court of Claims is in error and should be reversed. It is respectfully submitted that plaintiff's petition is meritorious and the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF CLAIMS

No. 275-76 thru 281-76,
286-76 thru 388-76

LT. COL. VINCENT PUGLISI, ET AL.

v.

THE UNITED STATES

CLERK'S OFFICE
Washington, D.C.

September 30, 1976

To *Attorney of Record and Assistant Attorney General, and Trial Judge Hogenson*

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the defendants' motion, filed September 29, 1976, to consolidate the following order: by the trial judge.

ALLOWED

Very truly yours,

FRANK T. PEARTREE

Clerk, Court of Claims.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Nos. 275-76 through 281-76 and
386-76 through 388-76

(Decided October 19, 1977)

LT. COL. VINCENT PUGLISI, ET AL.

v.

THE UNITED STATES

John A. Everhard, attorney of record, for plaintiffs. *Thomas H. King,* of counsel.

Richard J. Webber, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant.

Before DAVIS, NICHOLS and KASHIWA, *Judges.*

ON DEFENDANT'S MOTION TO DISMISS THE PETITION AND ON PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge,* delivered the opinion of the court:

Plaintiffs are retired regular officers of various components of the uniformed services who hold civilian positions with the federal government. As retired regular officers they are permitted to receive their full civilian pay but, pursuant to the Dual Compensation Act of 1964, now 5 U.S.C. § 5532(b) (1970), their retirement pay is substantially reduced.[1] Retired reserve officers, on the other hand, are exempted from the Dual Compensation Act and therefore allowed to receive their full civilian pay and full retirement pay simultaneously. 5 U.S.C. § 5534. In this suit for the amount of retirement pay withheld from them, claimants assert that the Act is unconstitutional, especially because it distinguishes between retired regular officers and retired reserve officers to the detriment of the former group. Defendant has moved to dismiss the petitions and plaintiffs have cross-moved for summary judgment. Only legal issues are raised, and the case is ready for disposition.

A.

Before we consider the arguments pro and con, we set forth a brief summary of the long history of the federal government's dual compensation legislation. The various forms of those laws date back to 1839. *See* 9 OP. ATT'Y GEN. 123 (1857) and 9 OP. ATT'Y GEN. 507 (1860); Sharp, *Dual Compensation and Employment Study,* American Law Division, Library of Congress, *109* Cong. Rec. 9546 (1963). The Supreme Court held that the primary purpose of the earlier provisions was to prevent a person holding a job setting definite compensation from receiving extra pay for additional services which might and should have become part of his regular duties. *See, United States v. Saunders,* 120 U.S. 126, 129 (1887). The Court there ruled that under the then prevailing law it was proper for someone to perform two distinct jobs concurrently and receive the salary for each; it was the Court's opinion, however, that the then-existing legislation prevented an officeholder adding on to his salary payments for

[1] 5 U.S.C. § 5532(b) provides generally that a retired regular officer may receive full civilian pay but his retirement pay shall be reduced to an annual rate equal to the first $2,000 of retirement pay plus one-half of any remainder. Certain exceptions and exemptions are provided for in § 5532(c) and (d). *See infra.*

"extra" duties which may not have been clearly designated in his original job description.

The next important dual compensation provision appeared in the Dual Office Act of 1894, ch. 174, § 2, 28 Stat. 162, 205, which the defendant sees as the forerunner of the 1964 Act with which we are now concerned. This 1894 statute declared that no one holding an office which paid $2,500 or more could be appointed to any other office to which compensation was attached. A retired officer of the regular armed forces was deemed an officeholder within the 1894 Act.[2] According to a modern-day observer, one reason for the 1894 law was to prevent abuse by officers using their military positions to obtain lucrative civil service jobs upon retirement.[3] If that intent can be ascribed to the 1894 Congress, then the Act, at least in large measure, was a "dual office" act designed to prohibit the holding of more than one high federal office. As we judge it, however, the purpose of the 1894 Act was more than that—not only to prevent those abuses but also to limit the total compensation receivable by any one person from the Government. The 1894 Act, although called the Dual Office Act, did not expressly prohibit dual officeholding (by retired military officers or others) *qua* officeholding. Instead, the Act set dollar limits on total salary. Under it a retired regular officer receiving retirement pay of $2,500 or more could not hold any other paid federal office. But according to H.R. REP. No. 890, 88th Cong., 1st Sess., p. 4 (Nov. 7, 1963), the 1894 Act, when passed, did not prevent many retired regular officers from holding dual office because retirement allowances and federal civilian

[2] *See, Hostinsky v. United States,* 154 Ct. Cl. 443, 446, 292 F.2d 508, 510 (1961).

[3] Testimony of F. J. Scanlon, Nat. Secretary, Fleet Reserve Assoc., Hearing before the Comm. on Post Office and Civil Service, House of Reps., 88th Cong., 1st Sess. (Oct., 1963) on H.R. 7552 at 74.

salaries were most often less than $2,500 each. As time went on and compensation rose, the prohibition bit deeper.[4] The next significant dual compensation provision, relevant here, was part of the Economy Act of 1932, Ch. 314, § 212, 47 Stat. 382, 406, which plaintiffs stress (it is discussed more fully, *infra*). This measure allowed a $3,000 maximum total federal compensation for retired officers holding civilian government jobs (an amount raised to $10,000 by amendment in 1955 (Act of Aug. 4, 1955, ch. 561, § 2, 69 Stat. 497, 498)); it also excepted retired reserve officers and regular officers retired for disability incurred in the line of duty.

Against this background, Congress passed the 1964 Act, part of which is now before us.[5] According to 5 U.S.C. § 5533, no one (with some exceptions) may receive the basic pay of more than one full-time civilian position in the federal government. The statute, however, liberalized the previous restrictions on retired regular officers (such as plaintiffs here). 5 U.S.C. § 5532(b), as we have noted, provides that retired regular officers can receive full pay for their civilian positions, subject to an annual reduction in retirement pay equal to the first $2,000 of that pay plus one-half of any remainder.[6] The Act continues the previous

[4] By the Act of May 31, 1924, Ch. 214, 43 Stat. 245, the 1894 Act was amended to exclude enlisted men and officers retired because of injuries or incapacity received in the line of duty, but this change did not affect those regular officers like plaintiffs who retired routinely at the completion of their active military careers.

[5] The 1964 Act, PUB. L. 88-448, 78 Stat. 484, was incorporated into the codification of Title 5 of the U.S. Code, PUB. L. No. 89-554, Sept. 6, 1966, 80 Stat. 378, 482, and is now 5 U.S.C. §§ 3326, 3501-3502, 5531-5533, 6303.

[6] Section 5532(b) also states that "In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in

rule exempting retired reserve officers from dual compensation restrictions (5 U.S.C. § 5534).

Its legislative history teaches that the 1964 Act was designed to simplify and consolidate previous dual compensation laws (including the 1894 and 1932 Acts), regulations and administrative interpretations. Restrictions on retired regular officers were eased to give those officers a greater chance to fill civilian jobs, an opportunity Congress thought would benefit both the officers and the government.[7] Congress intended, by easing the then restrictions on retired regular officers, to give such persons civilian employment opportunities more in line with those available to retired reserve officers completely unaffected by dual compensation limitations. Congress did not, however, entirely remove the restrictions on dual compensation for retired regular officers. It is this residue which is under attack in this suit.

B.

Plaintiffs' first, and less substantial, challenge is that 5 U.S.C. § 5532(b) constitutes a direct tax upon them, not in

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retired or retirement pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index."

Subsection (c) excepts from coverage regular officers retired for line-of-duty disability or war wounds, as well as temporary or part-time civilian employees, and subsection (d) gives the Civil Service Commission and certain other officials power to grant other exceptions for special or emergency employment needs.

[7] The Act's legislative history states that "• • • [T]he Government may be the loser because of these restrictions. Many skilled technicians, retired . . . from the Armed Forces, can be effectively utilized in civilian agencies. But because of the restrictions of present law, the Government cannot even offer these people employment even though many of them would prefer to remain in public service and are particularly suited to Federal employment. A major source of well-trained prospective employees is completely unavailable." S. Rep. No. 935, 88th Cong., 2d Sess. 2 (1964) *reprinted in* [1964] U.S. Code Cong. & Ad. News 2835.

proportion to the census, and therefore in violation of article I, section 9, clause 4 of the Constitution.[8] This curious argument is rested on the purported purpose of the Economy Act of 1932, the true forerunner, plaintiffs insist, of the Dual Compensation Act of 1964. According to plaintiffs, the Economy Act was, in reality, a taxing statute designed to "increase" federal revenues during a time of great national financial distress. It is said that the 1932 limitations on dual compensation were a before-the-fact tax on certain officeholders and but for the goal of exacting this "tax" the compensation ceilings would have been lifted. The argument concludes that, since the 1964 dual compensation Act was a modernization and reenactment of 1932, the later enactment is also unconstitutional on the same ground.

There are at least three conclusive answers to claimants' farfetched line of argument. First, the terms of the 1964 Act and its legislative history demonstrate that it was more than a mere replication of the Economy Act of 1932. As we have spelled out in Part A, *supra*, one of the basic goals of the later statute was to consolidate and simplify all prior dual compensation laws and regulations in one manageable law. Over 50 separate statutes and 200 Comptroller General (or predecessor) opinions were involved. *See* S. Rep. No. 935, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. Code & Ad. News 2834. The history also shows that both the 1894 and 1932 Acts were being revised and, in fact, the 1964 Act made more changes with an eye

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[8] This constitutional provision states:

> No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

The clause was modified, or course, by the Sixteenth Amendment giving Congress power to tax income without regard to apportionment among the states or census count.

toward the 1894 statute than it did with respect to other prior pieces of legislation. We are convinced that it had a wider purpose and form than mere updating of the 1932 dual compensation legislation, and the sins, if any, of the latter should not be visited on the former.

But even if we were to agree with plaintiffs that the 1932 Economy Act was the direct forebear of and dominant influence upon the 1964 Act, we still could not agree that that statute was in any legal sense a tax measure. Of course, the Economy Act need not have been a part of a "Tax Act of 1932" in order to impose, in reality, a direct tax. We assume that in applying article I, section 9, clause 4, the Supreme Court would look to substance rather than form. *Cf., e.g., American Oil Co. v. Neill,* 380 U.S. 451, 455 (1965); *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 443 (1940); *Western Union Tel. Co. v. Kansas,* 216 U.S. 1, 30 (1910); *Galveston, Harrisburg Ry. v. Texas,* 210 U.S. 217, 227 (1908); *Henderson v. Mayor of New York,* 92 U.S. 259, 268 (1876). But here the substance was in direct historical descent from a long-standing policy limiting dual opportunities to receive pay from the federal government —a qualification upon federal employment and compensation, rather than a tax, direct or otherwise. Moreover, the debates prove that the 1932 Act (which not only contained a stringent ceiling on dual compensation but also provided for compulsory retirements, impoundment of appropriations, and reduced federal travel allowances) was enacted not as, but in lieu of, stringent tax measures. The objective was to restrict the overall expenditure of federal monies, thus alleviating to some extent the need to tax the general public in order to bring revenues back into the Treasury. One Congressman pointed out that the underlying intent was relief from taxation:

> I am opposed to adding greater burdens and additional taxation upon the already overtaxed people. [Rep. Sabath, 75 CONG. REC. 9076, April 27, 1932].

Another said:

> Rather than do this [increase taxes], let us cut the expenses of this Government $243,000,000 . . . [W]e must . . . tax . . . more or cut . . . expenses . . . . [75 CONG. REC. 8077-78, April 12, 1932].

Plaintiffs attempt to turn legislation designed to restrict federal expenditures into a tax measure by saying that the Act necessarily levied a tax accomplished through deprivation of putative increased benefits to retired officers like plaintiffs, and therefore became a revenue-producing device. This interpretation obviously strains the accepted legal definition of taxation to the bursting point, and would put in doubt any Congressional attempt to decrease or maintain through the appropriation mechanism statutorily-created benefits to recipients as a class. As many courts have said, a tax in legal contemplation is an exaction, taking money from the taxpayer for public purposes; it is an enforced proportional contribution of money or other property. The 1932 Act did not take from retired officers any money or property to which they were entitled.[9] It simply closed off to them, partially, another source of federal compensation (*i.e.* federal civilian pay) which Congress felt they should not also have.

Thirdly, even if we accepted plaintiffs' extraordinary notion that the 1932 Act imposed a direct tax upon retired officers, we would have to hold that the "tax", since it affected income received from the government, was an

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[9] At least if retirement pay is not reduced in monetary terms from the level when the serviceman retired, even a retired officer has no vested or contractual right to any particular amount of retirement pay. *Andrews v. United States,* 175 Ct. Cl. 561, 562-63 (1966); *cf. United States v. Larionoff,* U.S. Sup. Ct., June 13, 1977, 45 U.S.L.W. 4650, 4654 (slip op., p. 15); *United States v. Teller,* 107 U.S. 64, 68 (1883).

income tax within the Sixteenth Amendment. *See Simmons v. United States,* 308 F.2d 160, 167-68 (4th Cir. 1962).

C.

The claimants' major attack on the dual compensation law is that it treats retired regular officers differently from retired reserve officers with respect to holding federal civilian positions. The latter do not lose any retirement pay if they take a civilian post while regular officers have their retirement pay cut down. This is said to violate the equal protection component incorporated into the Fifth Amendment's Due Process clause.[10]

Under the Supreme Court's prevailing formulation the validity of the classification drawn by Congress in the dual compensation statute is to be examined under the "rational basis" standard—whether it is rationally related both to a legitimate governmental interest and to the objective of the particular legislation. *Ohio Bureau of Employment Services v. Hodory,* — U.S. —, 45 U.S.L.W. 4544, 4549 (May 31, 1977); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 312-14 (1976); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 813-14 (1976); *Johnson v. Robison,* 415 U.S. 361, 374-75 (1974); *Dandridge v. Williams,* 397 U.S. 471, 486-87 (1970). "Strict scrutiny" is not appropriate since the separate classification of retired regular officers is certainly not "drawn upon inherently suspect distinctions such as race, religion, or alienage" (*New Orleans v. Dukes, supra,* at 303; *see also Massachusetts Board of Retirement v. Murgia, supra,* at 313-14),[11] and the right to governmental employment is not *per se* "fundamental" in the constitutional sense. *See Massachusetts Board of Retirement v. Murgia, supra,* at 313; *Fredrick v. United States, supra,* 205 Ct. Cl. at 797, 507 F.2d at 1266.

[10] On this incorporation, *see, e.g., Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Bruinooge v. United States,* 213 Ct. Cl. ——, ——, 550 F.2d 624, 626 (1977); *Fredrick v. United States,* 205 Ct. Cl. 791, 796 n.1, 507 F.2d 1264, 1266 n.1 (1974).

One obvious purpose of the 1964 dual compensation law, as it was of the predecessor statutes, is in general to put a ceiling on the amount of compensation certain classes of individuals can receive from the federal government. This is, of course, a proper object of congressional concern. Setting the pay of federal officers and employees is, historically and constitutionally, within Congress's power. *Atkins v. United States,* 214 Ct. Cl. —, 556 F.2d 1028 (1977). No one could gainsay Congress's authority to provide prospectively that all retired officers could hold a federal civilian position only at the cost of losing part or all of their retirement pay.[12] The only question is whether the statutory distinction challenged here—between retired regular and retired reserve officers—has rational support within an over-all project for limiting federal compensation and restricting dual office-holding.

While legislation over the years has made the conditions of service for regular and reserve officers more comparable,[13] important distinctions, relevant to dual compensa-

[11] In *Bruinooge v. United States, supra,* we applied the rational basis standard to a statute differentiating the whole class of military commissioned officers from that of non-officers.

[12] Plaintiffs do not contest the right of Congress to reduce retirement pay for military personnel taking federal civilian jobs, if that is done non-discriminatorily. In view of the congressional right to limit total federal compensation, such across-the-board reduction would seem no more invalid than a flat prohibition on dual employment or a requirement that a new employee or officer divest himself of property which could cause a conflict-of-interest.

[13] Plaintiffs claims that by 1964 large numbers of reserve officers served full time in the military "under conditions identical in every

tion considerations, still exist. *See, e.g., Dandridge v. Williams, supra,* 397 U.S. at 485. The more lenient treatment of retired reserve officers for dual compensation purposes can be justified on two principal grounds. First, according to military regulations,[14] regular officers can normally serve longer and receive significantly higher retirement pay than reserve officers. As one Congressman noted for the record:

> They [retired regular officers] are a different group of people. The Regular officers do receive more advancement in their terms of service and are allowed to go on for 30 years and receive 75 percent of their base pay when the vast majority of Reserve officers must retire at the end of 20 years and receive 50 percent of their base pay and do this at an earlier stage of life when they still have children in school or college to educate. It is an entirely different situation. [Rep. Broyhill, 110 CONG. REC. 3018].

respect to Regular officers." For example, they assert, reserve and regular officers receive the same kind of retirement privileges and benefits including the same identification cards, medical and commissary privileges, club memberships and airlift privileges. However, these similarities (and others of the same nature), to the extent they exist, do not make the two groups of officers virtually identical for all purposes. *See Taussig v. McNamara,* 219 F.Supp. 757, 761-62 (D.D.C. 1963), *affd generally,* D.C. Cir., *cert. denied,* 379 U.S. 834 (1964), upholding the validity of legislation (a) prohibiting a retired regular, but not a retired reserve, officer from participating in sales to the department in whose service he holds retired status, and (b) subjecting retired regular officers (but not retired reservists) to continuing court-martial jurisdiction.

Moreover, while it is true that there are many retired reservists who have served long periods on active duty, there are also many others who earned their retirement by part-time duty over a number of years, and never served for any extended time on full-time duty.

[14] *See, e.g.,* AR 635-100, § V (3-31), § III (4-20, 21, 25, 26).

Congress, wanting to limit the total government compensation receivable by any one person, reduced the retirement pay of regular officers holding federal civilian jobs, with a view toward bringing their total compensation more in line with that of retired reserve officers in such civilian positions. This was neither wholly unreasonable nor invidious.

The second rational basis for the Act's differentiation between the classes of retired officers is premised on the difference between the military offices they hold. A regular officer who has retired remains a member of the regular armed services (*see, e.g.,* 10 U.S.C. §§ 3504(a), 8504(a) (1970)).[15] A retired reserve officer's status is different—he can be ordered to active duty only in time of war or national emergency after all active reservists have been called. 10 U.S.C. § 672(a) (1970). A retired regular officer, therefore, continues at all times to hold an office in the military—he is already a federal officeholder. That fact was one basis for the virtually complete prohibition of civilian officeholding by them in the past. The 1964 Dual Compensation Act can properly be viewed as some liberalization of the previously very stringent but lawful treatment of retired regular officers rather than as an attempt to continue an invalid discrimination against them. As in *Taussig v. McNamara, supra,* 219 F.Supp. at 761-62, the separation between regular and reserve retired officers is not arbitrary.

Minimizing these grounds for the legislative choice, plaintiffs lean heavily on efforts by the Executive Branch to have the differentiation removed as inequitable. The Cabinet Committee on Federal Staff Retirement System indicated in its 1966 report that the distinction in the dual

[15] This court has held that a retired regular officer is validly subject to courtmartial jurisdiction. *Hooper v. United States,* 164 Ct. Cl. 151, 326 F.2d 982, *cert. denied,* 377 U.S. 977 (1964).

compensation law between regular and reserve retired officers was contrary to consistency and equity (H.R. Doc. No. 402, 89th Cong., 2d Sess., March 7, 1966); the Committee's staff went a bit further and referred to the "discriminatory treatment of the retired Regular officer vis-a-vis the retired Reserve officer or enlisted member," and could not see "any logical reason" for the penalty" on the regular officer (SEN. Doc. No. 14, 90th Cong., 1st Sess., Apr. 6, 1967). In 1970 the Department of Defense asking Congress to eliminate the difference, said that "logic and equity" dictated similar treatment and pointed to the "inconsistency and inequity" of the existing restriction. The Civil Service Commission, labeling the distinction as "discriminatory," wrote to Congress that it would not object to the enactment of legislation removing "this inequity to retired regular officers." [16]

Like many terms used in the law, the words "discriminatory," "illogical," "unfair" and "inequitable" have different values in different contexts. They are fitting for an agency to use in trying to persuade Congress to change a rule which the agency deems unjust as a matter of good employment policy. But a court's task in evaluating (where the test is the rational basis standard) the constitutional validity of that same rule is quite another function. The court cannot strike down the Congressional choice because it believes Congress erred or made a wrong policy decision or even because the result seems "unfair" in some general sense. If the distinction embodied in the law is reasonably related to a legitimate governmental interest which Congress seeks to advance, the court must uphold the rule even though it may seem unwise or that a more just system could clearly be advised. *See Ohio Bureau of Employment Services v. Hodory, supra; Mas-*

[16] Congress did not accede to these requests to change the dual compensation statute.

sachusetts Board of Retirement v. Murgia, supra; Dandridge v. Williams, supra. The "opposed views of public policy are considerations for the legislative choice." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 167 (1973). Congress has the authority to choose, and we cannot impose our own judgment, or that of others within the government, if there is any reasonable basis for what Congress has done. *See Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359-60, 365 (1973). If the legislature may properly think that an evil is specially acute for one group (such as retired regular officers as a class), it may select that aspect "and apply a remedy there, neglecting the others." *See Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955).[17] Similarly, a classification with a rational basis will not be set aside because it is "imperfect" or lacking "mathematical nicety," or because "in practice it results in some inequality." *Dandridge v. Williams, supra,* 397 U.S. at 485; *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961); *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 78 (1911); *Bruinooge v. United States, supra,* 213 Ct. Cl. at —, 550 F.2d at 628.

Finding as we have that there is a rational basis for singling out retired regular officers with respects to dual compensation, we cannot deny to Congress, the legislative branch of the federal goverment, the right in its own judgment to make that distinction. *See Alexander v. Fioto,* — U.S. —, 45 U.S.L.W. 4359, 4360 (April 4, 1977). There

[17] Dual compensation is a subject to which Congress returns from time to time, and at any moment it "may take one step at a time" and "may select one phase of one field," as it sees the need. *Williamson v. Lee Optical Co., supra; Jefferson v. Hackney,* 406 U.S. 535, 546 (1972); *Geduldig v. Aiello,* 417 U.S. 484, 495 (1974). There are indications that, at the present time, there may be some Congressional interest in applying some type of dual compensation limitation to certain retired reserve officers as well as to retired regulars.

is no "invidious discrimination" vulnerable to the Fifth Amendment, though the law's impact may seem to us or to others to have elements of unfairness. To remove those possible ineqtities, plaintiffs and their class must resort to Congress, not to the courts.

Aside from the exemption of retired reserve officers, claimants take a glancing blow at the provision of the dual compensation law (5 U.S.C. § 5532(d)) for exceptions for "special or emergency employment needs which otherwise cannot be readily met." [18] This standard for exceptions plainly has rationality and Congress cannot be faulted for permitting leeway in the fact of such necessity.[19]

It is urged, finally, that even if the statute would otherwise be valid it should be read to provide merely for temporary deferment of the withheld portion of the regular's retired pay, rather than for complete elimination of that part. As with the comparable statutory argument in

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[18] The Civil Service Commission, subject to the President's supervision and control, prescribes regulations under which such exceptions can be made within the Executive Branch. The President of the Senate, the Speaker of the House, and the Architect of the Capitol, have the same authority for their legislative components. The Administrator of the National Aeronautics and Space Administration also has similar specific authority for not more than 30 exceptions.

[19] Plaintiffs also make a convoluted argument that 5 U.S.C. § 5532 violates the Fourteenth Amendment via the Ninth and Tenth Amendments. This seems to say no more than that, since the distinction between retired regulars and retired reserves is invidiously discriminatory, it could not be made by the states under the Fourteenth Amendment and therefore could not be delegated to the Federal Government under the Ninth and Tenth Amendments. Because we have held, contrary to plaintiffs' contention, that the distinction, as made in this statute, is not invidiously discriminatory, we need not stop to discuss whether the Fourteenth Amendment can ever be invoked against a federal statute.

Alexander v. Fioto, supra, the text and purpose of this enactment refute the suggested reading. The law provides that, during the period the retired regular officer holds a civilian position, "his retired or retirement pay shall be *reduced*" (emphasis added), not deferred; and reduction is necessary to meet the declared objective of the statute to limit the over-all compensation paid to such officers by the United States. That has been the consistent interpretation since 1964.

For these reasons, we grant defendant's motion to dismiss the petitions and deny plaintiffs' cross-motions for summary judgment. The petitions are dismissed.

APPENDIX C

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

APPENDIX D

Constitution

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

§ 5532. Employment of retired officers of the uniformed services: reduction in retired or retirement pay; exceptions

(a) For the purpose of this section, "period for which he receives pay" means the full calendar period for which a retired officer of a regular component of a uniformed service receives the pay of a position when employed on a full-time basis, but only the days for which he actually receives that pay when employed on a part-time or intermittent basis.

(b) A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retirement pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index.

(c) The reduction in retired or retirement pay required by subsection (b) of this section does not apply to a retired officer of a regular component of a uniformed service—

(1) whose retirement was based on disability—

(A) resulting from injury or disease received in line of duty as a direct result of armed conflict; or

(B) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by sections 101 and 301 of title 38; or

(2) employed on a temporary (full-time or part-time) basis, any other part-time basis, or an intermittent basis, for the first 30-day period for which he receives pay.

The exemption from reduction in retired or retirement pay under paragraph (2) of this subsection does not apply longer than—

(i) the first 30-day period for which he receives pay under one appointment from the position in which he is employed, if he is serving under not more than one appointment; and

(ii) the first period for which he receives pay under more than one appointment, in a fiscal year, which consists in the aggregate of 30 days, from all positions in which he is employed, if he is serving under more than one appointment in that fiscal year.

(d) Except as otherwise provided by this subsection, the Civil Service Commission, subject to the supervision and control of the President, may prescribe regulations under which exceptions may be made to the restrictions in subsection (b) of this section when appropriate authority determines that the exceptions are warranted because of special or emergency employment needs which otherwise cannot be readily met. The President of the Senate with respect to the United States Senate, the Speaker of the House of Representatives with respect to the United States House of Representatives, and the Architect of the Capitol with respect to the Office of the Architect of the Capitol each may provide for a means by which exceptions may be made to the restrictions in subsection (b) of this section when he determines that the exceptions are warranted because of special or emergency employment needs which otherwise cannot be readily met. The Administrator of the National Aeronautics and Space Adminis-

tration may except, at any time, an individual appointed to a scientific, engineering, or administrative position under section 2473(b) (2) (A) of title 42 from the restrictions in subsection (b) of this section when he determines that the exception is warranted because of special or emergency employment needs which otherwise cannot be readily met, but not more than 30 exceptions may exist at any one time under this authority. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 482.

APPENDIX F

§ 5534. Dual employment and pay of Reserves and National Guardsmen

A Reserve of the armed forces or member of the National Guard may accept a civilian office or position under the Government of the United States or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances as a Reserve or member of the National Guard. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 484.

APPENDIX G

§ 1401. Computation of retired pay

The monthly retired pay of a retired person entitled under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula No.	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
1	1201 1204	Monthly basic pay[1] of grade to which member is entitled under section 1372 or to which he was entitled on day before retirement or placement on temporary disability retired list, whichever is higher.[4]	As member elects— (1) 2½% of years of service credited to him under section 1208;[3] or (2) the percentage of disability on date when retired.		Excess over 75% of pay upon which computation is based.

Formula No.	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
2	1202 1205	Monthly basic pay[1] of grade to which member is entitled under section 1372 or to which he was entitled on day before retirement or placement on temporary disability retired list, whichever is higher.[4]	As member elects— (1) 2½% of years of service credited to him under section 1208;[3] or (2) the percentage of disability on date when his name was placed on temporary disability retired list.	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
3	1331	Monthly basic pay[2] of highest grade held satisfactorily by person at any time in the armed forces.	2½% of years of service credited to him under section 1333.		Excess over 75% of pay upon which computation is based.
4	564 1255 1263 1293 1305	Monthly basic pay to which member would have been entitled if he had served on active duty in his retired grade on day before retirement, or if the pay of that grade is less than the pay of any warrant grade satisfactorily held by him on active duty, the monthly basic pay of that warrant officer grade.	2½% of years of service that may be credited to him under section 1405 of this title.[3]		Excess over 75% of pay upon which computation is based.

(footnotes on page 26a)

[1] Compute at rates applicable on date of retirement or date when member's name was placed on temporary disability retired list, as the case may be.

[2] Compute at rates applicable on date when retired pay is granted.

[3] Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[4] For an officer who served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, compute at the highest rates of basic pay applicable to him while he served in that office. For an enlisted person who has served as sergeant major of the Army, senior enlisted advisor of the Navy, chief master sergeant of the Air Force, sergeant major of the Marine Corps, or master chief petty officer of the Coast Guard, compute at the highest rate of basic pay applicable to him while he also served, if that rate is higher than the rate authorized by the table.

Aug. 10, 1956, c. 1041, 70A Stat. 106; May 20, 1958, Pub. L. 85-422, §§ 6(7), 11(a)(2), 72 Stat. 129, 131; Oct. 2, 1963, Pub. L. 88-132, § 5(h)(1), 77 Stat. 214; Aug. 21, 1965, Pub. L. 89-132, § 6, 79 Stat.

§ 1405. Years of service

For the purposes of section 1401 (formula 4), 3888(1), 3927(b)(1), 3991 (formula B), 6151(b), 6323(e), 6325(a)(2) and (b)(2), 6381(a)(2), 6383(c)(2), 6390(b)(2), 6394(h), 6396(c)(2), 6398(b)(2), 6400(b)(2), 8888(1) 8927(b)(1), or 8991 (formula B) of this title, the years of service of a member of the armed forces are computed by adding—

(1) his years of active service;

(2) the years of service credited to him under section 205(a)(7) and (8) of title 37;

(3) the years of service, not included in clause (1) or (2) with which he was entitled to be credited, on the day before the effective date of this section, in computing his basic pay; and

(4) the years of service, not included in clause (1), (2), or (3), with which he would be entitled to be credited under section 1333 of this title, if he were entitled to retired pay under section 1331 of this title.

For the purpose of this section, a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

Added Pub. L. 85-422, § 11(a)(1)(A), May 20, 1958, 72 Stat. 130, and amended Pub. L. 85-861, § 1(31A), Sept. 2, 1958, 72 Stat. 1451; Pub. L. 87-649, § 6(f)(4), Sept. 7, 1962, 76 Stat. 494; Pub.L. 87-651, Title I, § 109, Sept. 7, 1962, 76 Stat. 509; Pub.L. 90-130, § 1(7), Nov. 8, 1967, 81 Stat. 374.

APPENDIX H

§ 3911. Twenty years or more: regular or reserve commissioned officers

The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer. Aug. 10, 1956, c. 1041, 70A Stat. 224.

Chapter 371.—Computation of Retired Pay

§ 3991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
A	3883 3884 3885 3886 3913 3915 3916 3919 3921 3922 3923	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 3888 or 3927(b), whichever is applicable.[4]	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
B	3911 3918 3920 3924	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 1405 of this title.[3]		Excess over 75% of pay upon which computation is based.
C	3914	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]	10% of product of columns 1 and 2 for extraordinary heroism in the line of duty.[5]	Excess over 75% of pay upon which computation is based.
D	3917	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]		Excess over 75% of pay upon which computation is based.

[1] For the purposes of this section, determine member's retired grade as if section 3962(c) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

[2] Compute at rates applicable on date of retirement.

[3] Compute at rates applicable on date of retirement, or if the member has served as sergeant major of the Army, compute at the highest basic pay applicable to him while he so served, if such basic pay is greater.

[4] Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[5] The Secretary of the Army's determination as to extraordinary heroism is conclusive for all purposes.

§ 6323. Officers: 20 years

(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

(b) For the purposes of this section—

(1) an officer's years of active service are computed by adding all his active service in the armed forces; and

(2) his years of service as a commissioner officer are computed by adding all his active service in the armed forces under permanent or temporary appointments in grades above warrant officer, W-1.

(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired—

(1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or

(2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade.

(d) A warrant officer who retires under this section may elect to be placed on the retired list in the highest grade and with the highest retired pay to which he is entitled under any provision of this title. If the pay of that highest grade is less than the pay of any warrant grade satisfactorily held by him on active duty, his retired pay shall be based on the higher pay.

(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the

rate of 2½% percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

(f) Officers of the Naval Reserve and the Marine Corps Reserve who were transferred to the Retired Reserve from an honorary retired list under section 213(b) of the Armed Forces Reserve Act of 1952 (66 Stat. 485), or are transferred to the Retired Reserve under section 6327 of this title, may be retired under this section, notwithstanding their retired status, if they are otherwise eligible. Aug. 10, 1956, c. 1041, 70A Stat. 394; Sept. 2, 1958, Pub.L. 85-861, § 1 (142), 72 Stat. 1509. Oct. 2, 1963, Pub.L. 88-132, § 5(h)(4), 77 Stat. 214.

§ 6325. Officers: retired grade and pay

(a) Except as provided in subsection (b), each officer who is retired under section 6321 or 6322 of this title—

(1) unless otherwise entitled to a higher grade shall be retired in the grade in which he was serving at the time of retirement; and

(2) unless otherwise entitled to higher pay, is entitled to retired pay at the rate of 2½% of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

(b) Each officer who is retired while serving in the grade of admiral, vice admiral, general, or lieutenant general, by virtue of an appointment under section 5231 or 5232 of this title or who is retired while serving in a

grade to which he was appointed under section 5597 of this title or promoted under section 5787 of this title—

(1) unless otherwise entitled to a higher grade, he shall be retired in the grade he would hold if he had not received such an appointment; and

(2) unless otherwise entitled to higher pay, is entitled to retired pay at the rate of 2½ percent of the basic pay of the grade he would hold if he had not received such an appointment multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based.

(c) A warrant officer who retires under section 6321, 6322, or 6323 of this title may elect to be placed on the retired list in the highest grade and with the highest retired pay to which he is entitled under any provision of this title. If the pay of that highest grade is less than the pay of any warrant grade satisfactorily held by him on active duty, his retired pay shall be based on the higher pay. Aug. 10, 1956, c. 1041, 70A Stat. 394; May 20, 1958, Pub.L. 85-422, § 11(a)(6)(B), 71 Stat. 131; Sept. 2, 1958, Pub.L. 85-861, § 1(143), 72 Stat. 1509.

§ 8911. Twenty years or more: regular or reserve commissioned officers

The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer of the Air Force who has at least 20 years of service computed under section 8926 of this title, at least 10 years of which have been active service as a commissioned officer. Aug. 10, 1956, c. 1041, 70A Stat. 549.

Chapter 871.—Computation of Retired Pay

§ 8991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this table, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
A	8883 8884 8885 8886 8913 3915 8916 8919 8921 8922 8923	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 8888 or 8927(b), whichever is applicable.[4]	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
B	8911 8918 8920 8924	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 1405 of this title.[3]		Excess over 75% of pay upon which computation is based.
C	8914	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 8925.[4]	10% of product of columns 1 and 2 for extraordinary heroism in the line of duty.[5]	Excess over 75% of pay upon which computation is based.
D	8917	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 8925.[4]		Excess over 75% of pay upon which computation is based.

[1] For the purposes of this section, determine member's retired grade as if section 8962(b) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

[2] Computo at rates applicable on date of retirement.

[3] Compute at rates applicable on date of retirement, or if the member has served as sergeant major of the Army, compute at the highest basic pay applicable to him while he so served, if such basic pay is greater.

[4] Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[5] The Secretary of the Army's determination as to extraordinary heroism is conclusive for all purposes.

As amended Sept. 7, 1962, Pub.L. 87-651, Title I, § 127, 76 Stat. 514; Oct. 2, 1963, Pub.L. 88-132, § 5(h)(2), 77 Stat. 214; Dec. 16, 1967, Pub.L. 90-207, § 3(5), 81 Stat. 654.

APPENDIX I

Pay and Allowances

Adjustment of Pay Rates Effective Oct. 1, 1976

Ex.Ord.No.11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees, provided for an adjustment of pay rates under this section effective Oct. 1, 1976. See Schedule set out below:

PART I—Monthly Basic Pay
(Years of service computed under 37 U.S.C. 205)

Commissioned Officers Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12
0-10[1]	$2943.90	$3047.40	$3047.40	$3047.40	$3047.40	$3164.10	$3164.10	$3406.80*
0-9	2609.10	2677.80	2734.50	2734.50	2734.50	2804.10	2804.10	2920.20
0-8	2363.10	2433.90	2491.80	2491.80	2491.80	2677.80	2677.80	2804.10
0-7	1963.50	2097.30	2097.30	2097.30	2190.90	2190.90	2318.40	2318.40
0-6	1455.30	1599.30	1703.40	1703.40	1703.40	1703.40	1703.40	1703.40
0-5	1164.00	1367.10	1461.30	1461.30	1461.30	1461.30	1506.00	1586.40
0-4	981.30	1194.30	1274.70	1274.70	1297.80	1355.70	1447.80	1529.40
0-3[2]	912.00	1019.40	1089.60	1205.70	1263.30	1308.90	1379.10	1447.80
0-2[2]	795.00	868.50	1043.10	1078.20	1100.70	1100.70	1100.70	1100.70
0-1[2]	690.00	718.50	868.50	868.50	868.50	868.50	868.50	868.50

Pay Grade	Over 14	Over 16	Over 18	Over 20	Over 22	Over 26	Over 30
0-10[1]	$3406.80*	$3650.40*	$3650.40*	$3894.60*	$3894.60*	$4137.30*	$4137.30*
0-9	2920.20	3164.10	3164.10	3164.10	3406.80*	3650.40*	3650.40*
0-8	2804.10	2920.20	3047.40	3164.10	3291.00	3291.00	3291.00
0-7	2433.90	2677.80	2861.70	2861.70	2861.70	2861.70	2861.70
0-6	1761.30	2040.30	2144.70	2190.90	2318.40	2514.00	2514.00
0-5	1692.30	1819.50	1923.90	1981.80	2051.40	2051.40	2051.40
0-4	1599.30	1668.90	1715.40	1715.40	1715.40	1715.40	1715.40
0-3[2]	1483.20	1483.20	1483.20	1483.20	1483.20	1483.20	1483.20
0-2[2]	1100.70	1100.70	1100.70	1100.70	1100.70	1100.70	1100.70
0-1[2]	868.50	868.50	868.50	868.50	868.50	868.50	868.50

[1] While serving as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, or Commandant of the Marine Corps, basic pay for this grade is $4565.10* regardless of cumulative years of service computed under Section 205 of Title 37 of the United States Code.

[2] Does not apply to commissioned officers who have been credited with over 4 years' active service as enlisted members.

* Basic pay is limited by Section 5308 of Title 5 of the United States Code, as added by the Federal Pay Comparability Act of 1970, to the rate for level V of the Executive Schedule which is, as of the effective date of this schedule, $3300.00 per month.

No. 77-1013

In the Supreme Court of the United States

OCTOBER TERM, 1977

VINCENT PUGLISI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, retired regular military officers now holding civilian positions with the federal government (Pet. App. 2a), contend that the Dual Compensation Act of 1964, as amended, 5 U.S.C. 5531-5534, violates the equal protection component of the Due Process Clause by treating them differently from retired reserve military officers.

1. The Dual Compensation Act of 1964 is the most recent of a series of statutes restricting retired military officers from holding "dual" offices or receiving "dual" salaries from the federal government. The policy against dual compensation was first established in the Dual Office Act of 1894, 28 Stat. 162, 205, which provided that no one holding "an office" paying $2,500 or more annually could be appointed to any other federal office. Under that statute retired regular officers were deemed current office-holders and thus subject to the restriction; retired reserve

officers were not. See *Hostinsky* v. *United States*, 292 F. 2d 508, 510 (Ct. Cl.); *Pack* v. *United States*, 41 Ct. Cl. 414.

The dual compensation and employment restrictions were altered in the Economy Act of 1932, 47 Stat. 382, 406, which allowed certain retired commissioned officers, left uncovered by the still standing 1894 Act,[1] to accept civilian posts with the federal government but limited their total annual compensation to $3,000.[2] The 1932 Act expressly excepted, *inter alia*, retired reserve officers.

The 1964 Act, which established a uniform rule (see Pet. App. 7a), for the most part relaxed the restrictions against dual office holding by retired regular military officers. Retired regular officers now may obtain and receive full salary for civilian federal employment, subject only to the condition that their military retirement pay "shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any." 5 U.S.C. 5532(b). The 1964 Act continues in effect the previous rule exempting retired reserve officers from the dual employment and pay restrictions; the retirement pay of reserve officers is not reduced if they hold civilian federal employment. 5 U.S.C. 5532(c), 5534.

The Court of Claims rejected petitioners' contention that the Dual Compensation Act is unconstitutional (564

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[1]The 1894 Act was not repealed with the passage of the Economy Act of 1932 and, as a result, the two statutes were concurrently applied until passage of the 1964 Act. Because the terms of the earlier statute were more restrictive and applied to many of the same officers as the 1932 statute, the only group of retired military personnel actually affected by the 1932 Act were "Regular and temporary commissioned officers retired for noncombat physical disability." S. Rep. No. 935, 88th Cong., 2d Sess. 3 (1964).

[2]This limit was raised to $10,000 in 1955. 69 Stat. 498.

F. 2d 403; Pet. App. 2a-17a). Scrutinizing the statute according to the "rational basis" test (Pet. App. 10a-11a), the court found that the distinction between regular and reserve retired officers is justified because "regular officers can normally serve longer and receive significantly higher retirement pay than reserve officers" (*id.* at 12a). The court found a second justification in the fact that a regular retired military officer "continues at all times to hold an office in the military [and] is already a federal officeholder" (*id.* at 13a), while a retired reserve officer "can be ordered to active duty only in time of war or national emergency after all active reservists have been called" (*ibid.*).

2. The decision of the Court of Claims is correct. There is no conflict among the circuits on the question presented here, which does not warrant review by this Court.

Petitioners recognize (Pet. 6-7) that Congress may constitutionally limit the dual compensation of retired regular military officers without limiting compensation of retired reserve officers so long as a rational basis for the distinction exists. See *Alexander* v. *Fioto*, 430 U.S. 634; *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307; *McGowan* v. *Maryland*, 366 U.S. 420, 425. Cf. *Johnson* v. *Robison*, 415 U.S. 361, 374-383. As the Court of Claims determined (Pet. App. 11a-13a), there are at least two legitimate bases for the distinction drawn by the 1964 Act.

One of Congress' primary purposes in passing the Dual Compensation Act and its predecessors was "to limit the total government compensation receivable by any one person * * *" (Pet. App. 13a). Yet, as one Congressman noted during debate on the 1964 Act, "[t]he Regular officers do receive more advancement in their term of service and are allowed to go on for 30 years and receive 75 percent of their base pay [upon retirement] when *the vast majority* of Reserve officers must [under military

regulations] retire at the end of 20 years and receive 50 percent of their base pay and do this at an earlier stage of life when they still have children in school * * *." Remarks of Rep. Broyhill, 110 Cong. Rec. 3018 (1964) (emphasis added). Thus, in applying the pay reduction rule of 5 U.S.C. 5532 to retired regular officers with federal civilian positions, Congress logically acted "with a view toward bringing their total compensation more in line with that of retired reserve officers in such civilian positions" (Pet. App. 13a). Although there may be a few instances, as petitioners suggest (Pet. 6-8), where a retired reservist draws greater total compensation than a similarly situated retired regular officer under this formula, a "classification * * * does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78." *Dandridge* v. *Williams*, 397 U.S. 471, 485. Congress may act on the basis of the characteristics of a group as a whole, and a statute need not require case-by-case decisions in order to be rational. *Califano* v. *Jobst*, No. 76-880, decided November 8, 1977, slip op. 5-6.

A second purpose of the Dual Compensation Act of 1964, carried forward from the Dual Office Act of 1894, is to restrict and regulate dual federal officeholding *per se*. As the Court of Claims observed, a regular officer who has retired still "continues at all times to hold an office in the military," with its attendant rights and obligations, and never sheds his status as "a federal officeholder" (Pet. App. 13a). A reserve officer, on the other hand, historically has been regarded as discarding his status as a federal officeholder on retirement. *Hostinsky* v. *United States*, *supra*. It is entirely reasonable for Congress to take this distinction into account in deciding to exempt retired reserve officers from the fiscal limitations on dual office holding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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